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ABSTRACT

Reported are summaries of 27 legal cases substantiating the right of handicapped children to equal protection under the law including the right of being provided with an education, and full rights of notice and due process in relation to their selection, placement, and retention in educational programs. Nineteen of the cases concern the right to an education, five the right to treatment, and three placement. Relevant facts concerning the plaintiffs are examined as well as the court pronouncements. Plaintiffs for the right to education seek such measures as a declaration that the provision of unequal amounts of tuition money depending on the category of handicap is unconstitutional, and a permanent injunction requiring educational programs for the retarded in schools, institutions, hospitals, and homes with all costs being charged to the responsible public agency. Cases about treatment protest such elements of institutional life as overcrowding, questionable medical research, lack of qualified personnel, and brutality. Considered are allegations that black children have been inappropriately classified as educable mentally retarded, and that the disproportionate number of bilingual children enrolled in classes for the mentally handicapped indicates inadequate placement procedures. (GW)

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A CONTINUING SUMMARY OF PENDING AND COMPLETED LITIGATION REGARDING THE EDUCATION OF HANDICAPPED CHILDREN

edited by

ALAN ABESON, Director
State-Federal Information Clearinghouse
For Exceptional Children

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ABSTRACTED - CEC ERIC

Council for Exceptional Children
1411 S. Jefferson Davis Highway
Suite 900
Arlington, Virginia 22202

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U.S. DEPARTMENT OF HEALTH,
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With increasing frequency U.S. courts are being confronted with civil actions dealing with the denial of the civil rights of handicapped children and adults. The majority of these actions have focused on the public responsibility to provide education and treatment for the nation's handicapped citizens. The decisions reported here dealing with children have substantiated the right of handicapped children to equal protection under the law - including being provided with an education and full rights of notice and due process in relation to their selection, placement, and retention in educational programs.

Recognizing that the litigation represents an important avenue of change. The State-Federal Information Clearinghouse for Exceptional Children (SFICEC), a project supported by the Bureau of Education for the Handicapped, U.S. Office of Education, located at The Council for Exceptional Children, has collected and organized this summary of relevant litigation. A variety of sources including attorneys, organizations, and the plaintiffs involved in the cases were contacted. The focus of the cases included in the summary is directed to education.

This summary does not include all cases filed to date. Information is continuously being received about new cases, and, thus, there is always something too recent to be included. SFICEC will continue to acquire, summarize, and distribute this information. Those interested in more in-depth information should contact SFICEC. Each new edition of the summary contains all the information presented in earlier editions; thus, there is no necessity for readers to obtain previous editions.

In addition to this material, SFICEC has access to extensive information regarding law, administrative literature (rules and regulations, standards, policies), and attorney generals' opinions of the state and federal governments regarding the education of the handicapped. For further information about the project's activities and services contact:

State-Federal Information Clearinghouse for Exceptional Children
Council for Exceptional Children
1411 S. Jefferson Davis Highway, Suite 900
Arlington, Virginia 22202

A.A.
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TABLE OF CONTENTS

	Page
RIGHT TO AN EDUCATION	
Mills v. Board of Education of e District of Columbia**	1
Pennsylvania Association for Retarded Children, Nancy Beth Bowman, et. al., v. Commonwealth of Pennsylvania, David R. Kurtzman, et. al.	4
Catholic Social Services, Inc., Jimmy, Debbie, et. al., v. Board of Education of the State of Delaware, Robert McBride, Kenneth C. Madden, et. al.**	6
Reid v. New York Board of Education	7
John Doe v. Milwaukee, Wisconsin Board of School Directors*	8
Marlega v. Board of School Directors of Milwaukee*	9
Wolf, et. al. v. The Legislature of the State of Utah	9
Maryland Association for Retarded Children, Leonard Bramble, et al. v. State of Maryland, et. al.*	10
North Carolina Association for Retarded Children, James Auten Moore, et. al. v. State of North Carolina, et. al.**	11
Crystal Rene Hamilton v. Dr. J. Iverson Riddle, Superintendent of Western Carolina Center, et. al.*	15
Benjamin Harrison, et al. v. State of Michigan, et. al.	16
Association for Mentally Ill Children (AMIC), Lori Barnett, et. al. v. Milton Greenblatt, Joseph Lee, et. al.	18
Mindy Linda Panitch, et. al. v. State of Wisconsin*	20
Lori Case, et. al. v. State of California, Department of Education, et. al.**	21
Michael Burnstein, Fred Polk, et. al. and Alan Miller, Jonathan Booth, et. al. v. The Board of Education and the Superintendent of the Contra Costa County School District**	22
Tidewater Association for Autistic Children v. Commonwealth of Virginia, et. al.*	23
Craig Uyeda v. California State School for the Deaf, et. al.*	24
Seth Kivell, P.P.A. v. Dr. Bernard Nemointin, et. al.*	24
In Re Held, New York Family Court*	25
RIGHT TO TREATMENT	
Wyatt, et. al. v. Stickney M.D., et. al.	27
Burnham v. Department of Public Health of the State of Georgia**	28
Ricci, et al. v. Greenblatt, et al.	29
New York Association for Retarded Children, et. al. v. Rockefeller, et. al. and Patricia Parisi, Anselmo Clarke, et. al. v. Rockefeller, et. al.	30
Patricia Welsch, et. al. v. Vera J. Likins, Commissioner of Public Welfare, et. al.*	30
PLACEMENT	
Larry P., M. S., M. J., et al. v. Riles, et. al.	32
Lebanks, et. al. v. Spears, et. al.	33
Guadalupe Organization, Inc., v. Tempe Elementary School District*	34

*New case this edition
**Change of status since last edition
***Decision rendered

RIGHT TO AN EDUCATION

MILLS v. BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA,
Civil Action No. 1939-71 (District of Columbia).

Shortly after the conclusion of the Pennsylvania case, another landmark was achieved in a similar case in the District of Columbia. In Mills v. D.C. Board of Education, the parents and guardians of seven District of Columbia children brought a class action suit against the Board of Education of the District, the Department of Human Resources, and the Mayor for failure to provide all children with a publicly supported education.

The plaintiff children ranged in age from seven to sixteen and were alleged by the public schools to present the following types of problems that led to the denial of their opportunity for an education: slightly brain damaged, hyperactive behavior, epileptic and mentally retarded, and mentally retarded with an orthopedic handicap. Three children resided in public, residential institutions with no education program. The others lived with their families and when denied entrance to programs were placed on a waiting list for tuition grants to obtain a private educational program. However, in none of these cases were tuition grants provided.

Also at issue was the manner in which the children were denied entrance to or were excluded from public education programs. Specifically, the complaint said that "plaintiffs were so excluded without a formal determination of the basis for their exclusion and without provision for periodic review of their status. Plaintiff children merely have been labeled as behavior problems, emotionally disturbed, hyperactive." Further, it is pointed out that "the procedures by which plaintiffs are excluded or suspended from public school are arbitrary and do not conform to the due process requirements of the fifth amendment. Plaintiffs are excluded and suspended without: (a) notification as to a hearing, the nature of offense or status, any alternative or interim publicly supported education; (b) opportunity for representation, a hearing by an impartial arbiter, the presentation of witnesses, and (c) opportunity for periodic review of the necessity for continued exclusion or suspension."

A history of events that transpired between the city and the attorneys for the plaintiffs immediately prior to the filing of the suit publicly acknowledged the Board of Education's legal and moral responsibility to educate all excluded children, and although they were provided with numerous opportunities to provide services to plaintiff children, the Board failed to do so.

On December 20, 1971, the court issued a stipulated agreement and order that provided for the following:

1. The named plaintiffs must be provided with a publicly supported education by January 3, 1972.

2. The defendants by January 3, 1972, had to provide a list showing (for every child of school age not receiving a publicly supported education because of suspension, expulsion or any other denial of placement): the name of the child's parents or guardian; the child's name, age, address, and

telephone number; the date that services were officially denied; a breakdown of the list on the basis of the "alleged causal characteristics for such non-attendance;" and finally, the total number of such children.

3. By January 3, the defendants were also to initiate efforts to identify all other members of the class not previously known. The defendants were to provide the plaintiff's attorneys with the names, address, and telephone numbers of the additionally identified children by February 1, 1972.

4. The plaintiffs and defendents were to consider the selection of a master to deal with special questions arising out of this order.

A further opinion is presently being prepared by United States District of Columbia Court Judge Joseph Waddy which will deal with other matters sought by the plaintiffs including:

1. A declaration of the constitutional right of all children regardless of any exceptional condition or handicap to a publicly supported education.

2. A declaration that the defendant's rules, policies, and practices which exclude children without a provision for adequate and immediate alternative educational services and the absence of prior hearing and review of placement procedures denied the plaintiffs and the class rights of due process and equal protection of the law.

On August 1, 1972, Judge Waddy issued a Memorandum, Opinion, Judgment and Decree on this case which in essence supported all arguments brought by the plaintiffs. This decision is particularly significant since it applies not to a single category of handicapped children, but to all handicapped children.

In this opinion, Judge Waddy addressed a number of key points reacting to issues that are not unique to the District of Columbia but are common throughout the nation. Initially he commented on the fact that parents who do not comply with the District of Columbia compulsory school attendance law are committing a criminal offense. He said, "the court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children. ... Thus the board of education has an obligation to provide whatever specialized instruction that will benefit the child. By failing to provide plaintiffs and their class the publicly-supported specialized education to which they are entitled, the board of education violates the statutes and its own regulations."

The defendants claimed in response to the complaint that it would be impossible for them to afford plaintiffs the relief sought unless the Congress appropriated needed funds, or funds were diverted from other educational services for which they ahd been appropriated. The court responded: "The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these 'exceptional' children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure

to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds. In Goldberg v. Kelly, 397 U.S. 254 (1969) the Supreme Court, in a case that involved the right of a welfare recipient to a hearing before termination of his benefits, held that Constitutional rights must be afforded citizens despite the greater expense involved.... Similarly the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."

Regarding the appointment of a master the court commented, "Despite the defendants' failure to abide by the provisions of the Court's previous orders in this case and despite the defendants' continuing failure to provide an education for these children, the Court is reluctant to arrogate to itself the responsibility of administering this or any other aspect of the public school system of the District of Columbia through the vehicle of a special master. Nevertheless, inaction or delay on the part of the defendants, or failure by the defendants to implement the judgment and decree herein within the time specified therein will result in the immediate appointment of a special master to oversee and direct such implementation under the direction of this Court."

Specifically, the judgment contained the following:

1. "That no child eligible for a publicly-supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a Rule, Policy or Practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative."

2. An enjoiner to prevent the maintenance, enforcement or continuing effect of any rules, policies and practices which violate the conditions set in one (above).

3. Every school age child residing in the District of Columbia shall be provided "... a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment..." within thirty days of the order.

4. Children may not be suspended from school for disciplinary reasons for more than two days without a hearing and provision for his education during the suspension.

5. Within 25 days of the order, the defendants shall present to the court a list of every additionally identified child with data about his family, residence, educational status, and a list of the reasons for non-attendance.

6. Within 20 days of the order individual placement programs including suitable educational placements and compensatory education programs for each child are to be submitted to the court.

7. Within 45 days of the order, a comprehensive plan providing for the identification, notification, assessment, and placement of the children will be submitted to the court. The plan will also contain information about the curriculum, educational objectives, and personnel qualifications.

8. Within 45 days of the order, a progress report must be submitted to the court.

9. Precise directions as to the provision of notice and due process including the conduct of hearings.

Finally, Judge Waddy retained jurisdiction in the action "to allow for implementation, modification and enforcement of this Judgment and Decree as may be required."

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN, Nancy Beth Bowman, et. al., v. COMMONWEALTH OF PENNSYLVANIA, David H. Kurtzman, et. al., Civil Action No. 71-42 (3 Judge Court, E. D. Pennsylvania).

In January, 1971, the Pennsylvania Association for Retarded Children (P.A.R.C.) brought suit against Pennsylvania for the state's failure to provide all retarded children access to a free public education. In addition to P.A.R.C., the plaintiffs included fourteen mentally retarded children of school age who were representing themselves and "all others similarly situated," i.e. all other retarded children in the state. The defendants included the state secretaries of education and public welfare, the state board of education, and thirteen named school districts, representing the class of all of Pennsylvania's school districts.

The suit, heard by a three-judge panel in the Eastern District Court of Pennsylvania, specifically questioned public policy as expressed in law, policies, and practices which excluded, postponed, or denied free access to public education opportunities to school age mentally retarded children who could benefit from such education.

Expert witnesses presented testimony focusing on the following major points:

1. The provision of systematic education programs to mentally retarded children will produce learning.

2. Education cannot be defined solely as the provision of academic experiences to children. Rather, education must be seen as a continuous process by which individuals learn to cope and function within their environment. Thus, for children to learn to clothe and feed themselves is a legitimate outcome achievable through an educational program.

3. The earlier these children are provided with educational experiences, the greater the amount of learning that can be predicted.

A June, 1971 stipulation and order and an October, 1971 injunction, consent agreement, and order resolved the suit. The June stipulation focused on the provision of due process rights to children who are or are thought to be mentally retarded. The decree stated specifically that no such child could be denied admission to a public school program or have his educational status changed without first being accorded notice and the opportunity of a due process hearing. "Change in educational status" has been defined as "assignment or re-assignment, based on the fact that the child is mentally retarded or thought to be mentally retarded, to one of the following educational assignments: regular education, special education, or to no assignment, or from one type of special education to another." The full due process procedure from notifying parents that their child is being considered for a change in educational status to the completion of a formal hearing was detailed in the June decree. All of the due process procedures went into effect on June 18, 1971.

The October decrees provided that the state could not apply any law which would postpone, terminate, or deny mentally retarded children access to a publicly-supported education, including a public school program, tuition or tuition maintenance, and homebound instruction. By October, 1971, the plaintiff children were to have been reevaluated and placed in programs, and by September, 1972, all retarded children between the ages of six and twenty-one must be provided a publicly-supported education.

Local districts providing preschool education to any children are required to provide the same for mentally retarded children. The decree also stated that it was most desirable to educate these children in a program most like that provided to non-handicapped children. Further requirements include the assignment of supervision of educational programs in institutions to the State Department of Education, the automatic re-evaluation of all children placed on homebound instruction every three months, and a schedule the state must follow that will result in the placement of all retarded children in programs by September 1, 1972. Finally, two masters or experts were appointed by the court to oversee the development of plans to meet the requirements of the order and agreement.

The June and October decrees were formally finalized by the court on May 3, 1972.

CATHOLIC SOCIAL SERVICES, INC., JIMMY, DEBBIE, et. al. v. BOARD OF EDUCATION OF THE STATE OF DELAWARE, ROBERT McBRIDE, KENNETH C. MADDEN, et. al.

Catholic Social Services of Delaware as part of its responsibilities places and supervises dependent children in foster homes. In the process of trying to obtain educational services for handicapped children, the agency found "... the special education facilities in Delaware totally inadequate."

The three children named in the suit included:

Jimmy, age 10, a child of average intelligence who has had emotional and behavioral problems which from the beginning of his school career, indicated a need for special education. Although special education program placement was recommended on two separate occasions, the lack of programs available prevented enrollment.

Debbie, age 13, has been diagnosed as a seriously visually handicapped child of normal intelligence who, because of her handicap, could not learn normally. She has had a limited opportunity to participate in a special education program, but as of September, 1971, none was available.

Johnnie, age 13, had for years demonstrated disruptive behavior in school which led, because of his teachers' inability to "cope" with him, to be recommended for placement in an educational program with a small student-teacher ratio, possibly in a class of "emotionally complex children." Until the time of the suit, he had not been able to receive such training.

Adrian, age 16, had a long history of psychiatric disability which prevented him from receiving public education. Following the abortive attempts of his mother to enroll him in school, he was ultimately placed in a state residential facility for emotionally disturbed children. This placement was made without psychological testing and with no opportunity for a hearing to determine whether there were adequate school facilities available for him. Approximately one year later he was brought to the Delaware Family Court on the charge of being "uncontrolled," and after no judgment as to his guilt or innocence, he was returned to the residential school on probationary status. If his behavior did not improve, as judged by the staff, he could later be committed to the State School for Delinquent Children. In July, 1970, the latter transfer was made without Adrian being represented by counsel or being advised of this right. Since that time, Adrian has received "some educational service ... but little or no specific training."

The complaint quotes the Constitution and laws of Delaware that guarantee all children the right to an education. Delaware Code specifies that "The State Board of Education and the local school board shall provide and maintain, under appropriate regulations, special classes and facilities wherever possible to meet the need of all handicapped, gifted and talented children recommended for special education or training who come from any geographic area." Further, the code defines handicapped children as those children "between the chronological ages of four and twenty-one who are physically handicapped or maladjusted, or mentally handicapped."

Because the respondents (Board of Education and others named in the complaint) have failed to provide the legally guaranteed education to the named children, the complaint urges that the respondents:

1. Declare that the petitioners have been deprived of rightful educational facilities and opportunities.

2. Provide special educational facilities for the named petitioners.

3. Immediately conduct a full and complete investigation into the public school system of Delaware to determine the number of youths being deprived of special educational facilities and develop recommendations for the implementation of a program of special education for those children.

4. Conduct a full hearing allowing petitioners to subpoena and cross-examine witnesses and allow pre-hearing discovery including interrogatories.

5. Provide compensatory special education for petitioners for the years they were denied an education.

The three named plaintiffs were placed in education programs prior to the taking of formal legal action.

REID v. NEW YORK BOARD OF EDUCATION, Civil Action No. 71-1380 (U.S. District Court, S.D. New York)

This class action was brought to prevent the New York Board of Education from denying brain-injured children adequate and equal educational opportunities. Plaintiffs alleged that undue delays in screening and placing these children prevented them from receiving free education in appropriate special classes, thus infringing upon their state statutory and constitutional rights, guarantees of equal protection and due process under the fourteenth amendment.

In this 1971 case it was alleged that over 400 children in New York City were, on the basis of a preliminary diagnosis, identified as brain damaged, but could not receive an appropriate educational placement until they participated in final screening, it would take two years to determine the eligibility of all these children. An additional group of 200 children were found eligible but were awaiting special class placement.

The plaintiffs further alleged that the deprivation of the constitutional right to a free public education and due process operated to severly injure the plaintiffs and other members of their class by placing them generally in regular classes which constituted no more than custodial care for these children who were in need of special attention and instruction. In addition, providing the plaintiffs with one or two hours per week of home instruction is equally inadequate. It was further argued that if immediate relief was not forthcoming all members of the class would be irreparably injured because every day spent either in a regular school class or at home delayed the start of special instruction.

On June 22, 1971, Judge Metzner, of the U.S. District Court for the Southern District of New York, denied the motion for a preliminary injunction and granted the defendants' motion to dismiss. The Court applied the abstention doctrine, reasoning that since there was no charge of deliberate discrimination, this was a case where the State Court could provide an adequate remedy and where resort to the federal courts was unnecessary.

On appeal, the Second Circuit Court of Appeals, ruling on the District Court order, on December 14, 1971 decided that federal jurisdiction should have been retained pending a determination of the state's claims in the New York State Courts. That determination is presently occurring.

JOHN DOE, et. al. v. MILWAUKEE, WISCONSIN BOARD OF SCHOOL DIRECTORS, et. al. (State of Wisconsin, Circuit Court, Civil Division, Milwaukee County)

The plaintiffs in this class action are represented by John Doe, a 14 year old trainable mentally retarded student. The suit against the Milwaukee Board of School Directors focused on the fact that although John Doe was tested by a school board psychologist who determined that he was mentally retarded and in need of placement in a class for the trainable mentally retarded, he was put on a waiting list for the program. It is alleged that this is a violation of the equal protection clause of the 14th amendment of the United States Constitution.

Plaintiffs argued that this violation occurred on two counts. First, John Doe, as a school age resident of the city of Milwaukee, is guaranteed an education by the Wisconsin constitution. It is pointed out that public education is provided to "the great bulk of Milwaukee children... without requiring them to spend varying and indefinite amounts of time on waiting lists waiting for an education."

The second alleged violation occurred because, under the law, the school directors are required "to establish schools sufficient to accommodate children of school age with various listed handicaps, including children with mental disabilities." It is further argued that at the same time of the complaint 400 trainable mentally retarded children were attending such classes. Thus, by denying the plaintiff participation in the program, the defendants are denying them equal protection of the law.

The plaintiffs sought:

1. A temporary order requiring immediate enrollment of plaintiffs in an appropriate class for trainable mentally retarded children.

2. An order enjoining the defendants from maintaining a waiting list that denies public education to those requiring special education.

A temporary injunction was ordered and the public schools were required to admit the plaintiffs into the program for trainable mentally retarded children with all reasonable speed which was defined as 15 days. This order delivered in 1969 is still in effect.

MARLEGA v. BOARD OF SCHOOL DIRECTORS, MILWAUKEE, WISCONSIN, Civil Action No. 70-C-8 (U.S. District Court, Wisconsin)

This case, completed in 1970, was a class action suit with Douglas Marlega as the named plaintiff. He brought suit against the board of school directors of the public schools of Milwaukee on the basis of denial of constitutionally guaranteed rights of notice and due process.

At issue was the exclusion of Marlega from public school attendance because of alleged medical reasons involving hyperactivity "...without affording the parents or guardians an opportunity to contest the validity of the exclusion determination." Marlega, of average intelligence, was completely excluded from February 16, 1968, to October 7, 1968. His parents were not given justification for the exclusion, nor were they given any opportunity for a due process hearing. Throughout the period of exclusion, "... no alternative public schooling is furnished on a predictable basis" and "no periodic review of the condition of excluded students is apparently made nor is home instruction apparently provided on a regular basis."

The following was sought by the plaintiff:

1. a temporary restraining order to reinstate Marlega and his class in school;

2. an order to defendants to provide the plaintiffs a due process hearing; and

3. an order to prevent the board of school directors of Milwaukee from excluding any children from school for medical reasons without first providing for a due process hearing except in emergency situations.

A temporary restraining order was awarded on January 14, 1970. On March 16, 1970, the Court ordered that no child could be excluded from a free public education on a full-time basis without a due process hearing. The school directors submitted to the court a proposed plan for the handling of all medically excluded children which was approved on September 17, 1970.

FRED C. WOLF, et. al. v. THE LEGISLATURE OF THE STATE OF UTAH Civil Action No. 182646 (Third Judicial District Court, Utah).

A 1969 ruling in the Third Judicial Court of Utah guaranteed the right to an education at public expense to all children in the state. This action was brought on behalf on two trainable mentally retarded children who were the responsibility of the State Department of Welfare. The children were not being provided with suitable education. The judge, in his opinion, stated that the framers of the Utah constitution believed "in a free and equal education for all children administered under the Department of Education." He further wrote that "the plaintiff children must be provided a free and equal education within the school districts of which they are residents, and the state agency which is solely responsible for providing the plaintiff children with a free and public education is the State Board of Education."

MARYLAND ASSOCIATION FOR RETARDED CHILDREN, LEONARD BRAMBLE, et. al. v. STATE OF MARYLAND, et. al. Civil Action No. 72-733-K (U.S. District Court, District of Maryland)

A class action suit is being brought by the Maryland Association for Retarded Children and 14 mentally retarded children against the state of Maryland and its state board of education, state superintendents of education, secretary of health and mental hygiene, director of the mental retardation administration, superintendents of state institutions, commissioner of the mental health administration, and local boards of education for their failure to provide retarded or otherwise handicapped children with an equal and free public education.

The 14 plaintiff children range from those classified as severely retarded to the educable. The majority of the children, whether living at home or in an institution, are not receiving an appropriate education with some children being denied any education to those inappropriately placed in regular education programs. For example, two educable children, residing in Baltimore city, have been placed and retained in regular kindergarten programs because they are not yet eight years old though their need for a special class placement has been recognized.

The complaint emphasizes the importance of providing all persons with an education that will enable them to become good citizens, achieve to the full extent of their abilities, prepare for later training, and adjust normally to their environment. It is further argued that "the opportunity of an education, where the state has undertaken to provide it, is a right that must be made available to all on equal terms."

The contention of the plaintiffs is indicated in the following:

"There are many thousands of retarded and otherwise handicapped school-age children (children under age 21) in the state of Maryland. Defendants deny many of these children (including each of the individual plaintiff children herein) free publicly-supported educational programs suited to their needs, and for transportation in connection therewith.

"More specifically, defendants deny such educational programs to many children who are retarded, particularly to those who are profoundly or severely retarded, or who are multiply disabled; or who are not ambulatory, toilet trained, verbal, or sufficiently well behaved; or who do not meet requirements as to age not imposed on either normal or handicapped children comparably situated. As a result of their exclusion from public education, the plaintiff children's class (including plaintiffs) must either (a) remain at home without any educational programs; or (b) attend nonpublic educational facilities partly or wholly paid for by their parents; or (c) attend 'day care' programs that are not required to provide structured, organized, professionally run programs of education; or (d) seek placement in public or nonpublic residential facilities, partly or wholly paid for by their parents, which do not provide suitable educational programs for many of these children.

"Like children for whom defendants provide suitable publicly-supported educational programs, including other retarded and otherwise handicapped children, the plaintiff children's class can benefit from suitable educational pro-

grams. The defendants' failure to provide these children with publicly-supported educational programs suited to their needs is arbitrary, capricious, and invidiously discriminatory and serves no valid state interest. The denial of such programs violated the plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States."

The plaintiffs allege that the state's tuition assistance program provides insufficient funds to educate these children and thus parents are forced to use their own resources. "Thus, defendants have conditioned the education of these children on their parents' ability to pay. That action is arbitrary, capricious, and invidiously discriminatory, serves no valid state interest, and violates the said plaintiffs rights under the due process and equal protection clauses of the Fourteenth Amendment...."

Another allegation is that the state when making placement decisions does not provide for notice and procedural due process.

The plaintiffs are seeking:

1. Declaration that the "unequal imposition of charges for programs for school-age children at state institutions are (is) unconstitutional."

2. Declaration that the provision of unequal amounts of tuition money depending on the category of handicap is unconstitutional.

3. Enjoiner to prevent the defendants from violating the due process and equal protections clauses of the Fourteenth Amendment including providing free publicly-supported education to plaintiff children and their class within 60 days of the order and a number of other action steps involving the identification of children, advertising the availability of programs, creating hearing and other due process procedures, planning, and reporting back to the court. The plaintiffs also asked the court to require that any public institutional or day care program in which a child is placed be structured to meet individual children's needs under "standards and criteria reasonably calculated to insure that the program provided is in fact a suitable program of education." They are also seeking compensatory education for the plaintiff children and the class they represent who were excluded or excused from school because of a physical, mental, emotional, or behavioral handicap. Finally, they seek appointment of a master.

This action was introduced on July 19, 1972, and is expected to be heard this fall.

NORTH CAROLINA ASSOCIATION FOR RETARDED CHILDREN, INC., JAMES AUTEN MOORE, et. al. v. THE STATE OF NORTH CAROLINA, Civil Action No. 72-72 (E.D. North Carolina, Raleigh Division)

On May 18, 1972, a suit was introduced in the Raleigh Division of the Eastern District Court of North Carolina by the North Carolina Association for Retarded Children, Inc. and thirteen mentally retarded children

against the state of North Carolina, various state agencies and their department heads, a city school district, and a county school district for failure to provide free public education for all of the state's estimated 75,000 mentally retarded children.

The class action suit names thirteen severely and moderately mentally retarded children as plaintiffs. The children's histories include never having been in public school, having been excluded from public school, delayed entrance into public school programs, or in some cases receiving an education through private programs at their parents' expense. Plaintiff children who had been receiving a public education were excluded because of alleged lack of facilities or failure of the children to meet certain behavioral criteria such as toilet training. In summary, the suit is being brought on behalf of "residents of North Carolina, six years of age and over, who are eligible for free public education but who have by the defendants (1) been excluded, or (2) been excused from attendance at public schools, or (3) had their admission postponed, or (4) otherwise have been refused free access to public education or training commensurate with their capabilities because they are retarded.

The defendants include the state, the state superintendent of public education, the department of public education, the state board of education, the department and the secretary of the department of human resources, the commissioner and the state board and the state department of mental health, the treasurer and the department of the state treasurer, the state disbursing officer and the controller of the state board of education, the Wake board of education, the Raleigh city board of education, and the Wake County board of commissioners. The two school districts are names as typical of all of the state's local city or county education agencies. The board of county commissioners is also named as representative of all of the state's county boards that "have the authority and duty to levy taxes for the support of the schools."

Plaintiffs' attorneys quote the North Carolina constitution which provides that "equal opportunities shall be provided for all students for free public school education." Further support for the legal obligations of the state to provide for the education of the mentally retarded comes from the following section of a 1967 North Carolina attorney general's opinion:

> "It is unconstitutional and invalid, therefore, to operate the public school system in a discriminatory manner as against the mentally retarded child and to allocate funds to the disadvantage of the mentally retarded child. Often a mentally retarded child develops fair skills and abilities and becomes a useful citizen of the state but in order to do this, the mentally retarded chils must have his or her chance."

The complaint specifically alleges that the school exclusion laws (G.S. Sec. 115-165) deprive the plaintiffs of the equal protection of the law in voilation of the 14th amendment of the U.S. Constitution in the following manner:

1. Discriminates between handicapped and non-handicapped children by allowing a county or city superintendent of schools to decide that a "Child cannot substantially profit from the instructions given in the public school as now constituted and as such discriminates against the severely afflicted by mental, emotional or physical incapacity children in favor of those children who are not so afflicted in that these unfortunate children are deprived of any and all educational training whereas the children who do not fall in this classification or category obtain complete free public education."

2. "Arbitrarily and capriciously and for no adequate reason" denies mentally retarded children educational opportunities to become self-sufficient and contributing citizens as guaranteed by the North Carolina constitution and laws and further "subjects them to jeopardy of liberty and even of life."

3. Denial of the plaintiff children from attendance in public schools imposes the unfair criterion of family wealth as the determining factor of their receiving an education. In effect, children from poor families are unable to obtain private education as can children from financially able families.

4. Plaintiffs' parents, although paying taxes for the support of public schools, are unable to have their children admitted and thus in order to obtain an education for them must pay additional funds.

Other counts included in the complaint are as follows:

1. In the implementation of the school attendance law plaintiffs are denied procedural due process of law as guaranteed in the 14th amendment of the U.S. Constitution including provisions for notice, hearing, and cross examination.

2. The North Carolina statute requiring parents to send their children to school contains an exception which relieves parents of children "afflicted by mental, emotional, or physical incapacities so as to make it unlikely that such child could substantially profit by instruction given in the public schools" from this responsibility. Plaintiffs argue however that this statute which is "to forgive what otherwise would be violations of compulsory attendance requirements and to preserve to the parents the decision of whether the child shall attend school" is in fact used to "mandate non-attendance contrary to parents' wishes and thus justify the exclusion of retarded children from the public schools in violation of their constitutional rights."

3. The defendants have ignored the law that all children are eligible for public school enrollment at age six and have excluded retarded children until they are older.

4. In addition to preventing the enrollment of plaintiff children in public schools, the defendants also are alleged to exclude, excuse, and postpone admission to public schools and to provide education for children at state schools, hospitals, institutions, and other facilities for the mentally retarded.

The suit seeks the following remedies:

1. Declaration that all relevant statutes, policies, procedures, and practices are unconstitutional.

2. Permanently enjoin the defendants from the practices described as well as "giving differential treatment concerning attendance at school to any retarded child."

3. A permanent injunction requiring that the defendants operate educational programs for the retarded in schools, institutions, and hospitals, and, if necessary, at home with all costs being charged to the responsible public agency.

4. A permanent mandatory injunction directing the defendants to provide compensatory years of education to each retarded person who has been excluded, excused, or otherwise denied the right to attend school while of school age and further enjoin the defendants to give notice of the judgment herein to the parents or guardians of each such child.

5. Provision to the plaintiffs the cost of the suit including "reasonable counsel fees."

On July 31, 1972, an expanded complaint was filed naming in addition to the North Carolina Association for Retarded Children, 22 plaintiff children. The new complaint joins the original North Carolina Association for Retarded Children suit with Crystal Rene Hamilton v. Dr. J. Iverson Riddle, Superintendent of Western Carolina Center, et. al. (Civil Action No. 72-86). The additional plaintiffs include children whose histories permitted the addition of the following allegations regarding the state's failure to provide for their education: "... who have by the defendants ... (5) been denied the right of free homebound instruction or (6) been denied the right of tuition or costs reimbursement in private schools or institutions or (7) been denied the right of free education, training or habilitation in institutions for mentally retarded operated by the State of North Carolina."

A further distinction is the allegation that there are state statutes which operate to grant "aid to the mentally retarded children below the age of six years in non-profit private facilities for retarded children and excluding such aid to mentally retarded children above six years attending the same type of institutions."

It is further alleged that the defendants further "failed to provide for appropriate free education, training and habilitation of the plaintiffs in their homes after excluding the plaintiffs from free education and training in the public schools and thus condition the plaintiffs education in the homes upon the impermissable criteria of wealth, denying training, education, and habilitation to those children whose parents are poor."

In the expanded suit an additional count has been introduced that focuses on the state institutions for the mentally retarded. Specifically, it is alleged that the centers for the retarded are "warehouse institutions which, because of their atmosphere of psychological and physical deprivation, the institutions are wholly incapable of furnishing habilitation to the mentally retarded and are conducive only to the deterioration and the debilitation of the residents." It is also charged that the institutions are understaffed, overcrowded, unsafe and do not provide residents with "education, training, habilitation, and guidance as will enable them to develop their ability and maximum potential."

The plaintiffs are seeking in addition to the remedies originally sought the granting of a permanent injunction:

1. to prevent the defendants from denying the right of any retarded child of six years and older to free homebound instruction;

2. to prevent the defendants from denying the reimbursement of tuition and costs to the parents of retarded children in private schools or facilities;

3. to direct the defendants to establish publicly-supported training programs and centers for all mentally retarded children without discrimination;

4. to direct the defendants "to provide such education, training and habilitation outside the public schools of the district or in special institutions or by providing for teaching of the child in the home if it is not feasible to form a special class in any district or provide any retarded child with education in the public schools of the district ..."

CRYSTAL RENE HAMILTON v. DR. J. IVERSON RIDDLE, SUPERINTENDENT OF WESTERN CAROLINA CENTER, Civil Action No. 72-86 (Charlotte Division, W.D. of North Carolina)

This case was filed on May 5, 1972, in the Charlotte Division of the Western District Court of North Carolina as a class action on behalf of all school age mentally retarded children in North Carolina. Defendants include the superintendent of the Western Carolina Center, a state institution for the mentally retarded; the secretary of the North Carolina department of human resources; the state superintedent of public instruction; and the chairman of the Gaston County board of education.

Crystal Rene Hamilton is an eight year old mentally retarded child who on November 1, 1971, when admitted to the Western Carolina Center had until that time received only nine hours of publicly-supported training. She was admitted to the Center "under the provision that she would be able to remain in said Center for a period of only six months, after which time it would be necessary for her to return to her home and be cared for by her parents; that she has been diagnosed as a mentally retarded child and needs a one-to-one ratio of care and treatment." The complaint alleges that the parents are unable to provide "this care and treatment," that the state does not have other facilities to provide the care and the Center administrator has notified Crystal's parents to take her home.

The cause of action cited in the complaint is that the state, through its board and agencies, "has failed to provide equal educational facilities for the plaintiff and has denied to her access to education and training ..." Thus it is alleged that the plaintiff has been denied equal protection of the law and equal education facilities as "guaranteed" by the United States constitution and the constitution and statutes of North Carolina. The statute "guarantees equal free educational opportunities for all children of the state between the ages of six and twenty-one years of age."

Also at issue is the classification scheme used by the state which "selects some students as eligible for education and some as not ..." Further, the complaint argues that the state's practice of making financial demands upon the parents of mentally retarded children for the care and treatment of their children" ... is repugnant to the provision of the law and is denying equal protection to said children..."

Arguing that Crystal Rene Hamilton and the members of her class have suffered and are now suffering irreparable injury, the plaintiffs are seeking the following relief:

1. A three-judge court be appointed to hear the case;

2. Enforcement of state statutes providing equal educational opportunities and declare null and void statutes that do otherwise;

3. An injunction be issued to prevent the Western Carolina Center from evicting Crystal Rene Hamilton;

4. That this action be joined with civil action No. 72-72 (North Carolina Association for Retarded Children, Inc., James Auten Moore, et. al. v. The State of North Carolina, et. al.); and

5. Plaintiff costs and counsel fees.

This case has been joined as requested in number 4 above. The number of plaintiffs has been expanded and the case is expected to be heard by a three-judge court within a month.

BENJAMIN HARRISON, THE COALITION FOR THE CIVIL RIGHTS OF HANDICAPPED PERSONS et. al., v. STATE OF MICHIGAN, et. al. Civil Action No. 38357 (E. D. Michigan Southern Division)

On May 25, 1972, the Coalition for the Civil Rights of Handicapped Persons, a non-profit corporation formed to advance the rights of handicapped children, and twelve handicapped children filed suit in the Southern Division of the United States District Court for the Eastern District of Michigan against the state of Michigan, the department of education, the department of mental health, the Detroit school board and officers, and the Wayne County intermediate school district and its officers' for their failure to provide a publicly-supported education for all handicapped children of Michigan.

The suit seeks class action status and divides the plaintiff children, all of whom are alleged to have mental, behavioral, physical or emotional handicaps, into the three distinct groups:

1. Children denied entrance or excluded from a publicly-supported education;

2. Children who are state wards residing in institutions receiving no education;

3. Children placed in special programs but that are alleged not to meet their learning needs.

The plaintiff children present a full range of handicapping conditions including brain damage, mild, moderate, or severe mental retardation, autism, emotional disturbance, cerebral palsy, and hearing disorders. The complaint suggests that the children named represent a class of 30,000 to 40,000 who are handicapped three times over. They are first handicapped by their inherited or acquired mental, physical, behavioral, or emotional handicap. Secondly "by arbitrary and capricious processes by which the defendants identify, label, and place them, and finally by their exclusion from access to all publicly-supported education."

The complaint argues that the right of these children to an education is based on Michigan law stating that "the legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." Further, Article VIII, Section 8 of the Michigan Constitution indicates that the state shall foster and support "institutions, programs, and services for the care, treatment, education, or rehabilitation of those inhabitants who are physically, mentally, or otherwise seriously handicapped."

Further, as in all of the right to education litigation, the role of education in preparing children to be productive adults and responsible citizens is emphasized and can be summarized by this quote: "No child can reasonably be expected to succeed in life if he is denied the opportunity of an education."

Of importance in this suit is that recognition is given in the complaint to a mandatory special education law effective July 1, 1972. However, since that law will not be fully implemented until the 1973-74 school year, the plaintiffs are presently being denied rights. In addition, it is pointed out that the mandatory act does not provide for compensatory education or the right to hearing and review as the educational status and/or classification of the children is altered.

The complaint seeks the following relief:

1. That the acts and practices of the defendants to exclude plaintiff children and the class they represent from and adequate publicly-supported education is a violation of due process of law and equal protection under the 14th amendment of the U.S. Constitution.

2. That the defendants be enjoined in continuing acts and practices which prevent plaintiffs from a regular public school education without providing (a) adequate and immediate alternatives and (b) a constitutonally adequate hearing and review process.

3. That plaintiffs and all members of the class be provided with a publicly-supported education within 30 days of the entry of such an order.

4. That within 14 days of the order defendants present to the court a list which includes the name of each person presently excluded from a publicly supported education and the reason, date, and length of his expulsion, suspension, exclusion, or other type of denial.

5. That parents or legal guardian of each named person be informed within 48 hours of the submission of that report of the child's rights to a publicly-supported education and his proposed placement.

6. That within 20 days of the entry of the order all parents in Michigan be informed that all children, regardless of their handicap or alleged disability, have a right to an education and the procedures available to enroll these children in programs.

7. That constitutionally adequate hearings on behalf of a person appointed by the court be conducted for any member of the plaintiff class who is dissatisfied by the education placement.

8. That plaintiffs be provided with compensatory services to overcome the effects of wrongful past exclusion.

9. That within 30 days from the entry of the order a plan for hearing procedures regarding refusal of public school admission to any child, the reassignment of the child to a regular public school and the review of such decisions be submitted to the court.

10. That within 30 days from the entry of the order a plan for adequate hearing procedures regarding suspension or expulsion of any student from school be submitted to the court.

11. Grant other relief as necessary including payment of attorney fees..

ASSOCIATION FOR MENTALLY ILL CHILDREN (AMIC), LORI BARNETT, et. al., v. MILTON GREENBLATT, JOSEPH LEE, et. al., Civil Action No. 71-3074-J (Massachusetts)

This class action suit is being brought by emotionally disturbed children against officers of the Boston school system, all other educational officers in school districts throughout the state, and the Massachusetts state departments of education and mental health for the alleged "arbitrary and irrational manner in which emotionally disturbed children are denied the right to an education by being classified emotionally disturbed and excluded both from the public schools and an alternative education program."

Lori Barnett, an eight year old child classified as emotionally disturbed, has never been provided with a public education by the Commonwealth. The situation has persisted even though she has sought placement in both the Boston special education program and residential placement in a state-approved school.

The suit specifically charges that as of July, 1971, a minimum of 1,371 emotionally disturbed children, determined by the Commonwealth as eligible for participation in appropriate educational programs, were denied such services. Instead they were placed and retained on a waiting list "for a substantial period of time." Although some of the children were receiving home instruction, this is not considered to be an appropriate program.

Secondly, it is alleged that the plaintiff children are denied placement in an arbitrary and irrational manner, and no standards exist on state or local levels to guide placement decision in either day or residential programs. It is argued that, in the absence of state standards, the placement of some students while denying placement to others similarly situated violates the plaintiffs' rights of due process and equal protection.

Another issue in this case concerns the allegation that the plaintiff children are denied access to appropriate educational programs without a hearing thus violating their rights to procedural due process.

Finally, it is charged that the failure to provide the plaintiff children with an education, solely because they are emotionally disturbed "... irrationally denies them a fundamental right, to receive an education and to thereby participate meaningfully in a democratic society, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution."

Declaratory judgment is sought to declare unconstitutional excluding or denying an emotionally disturbed child from an appropriate public education program for which he is eligible without a hearing. Also sought is a judgment of unconstitutionality regarding the denial of placement to eligible emotionally disturbed children in the absence of "... clear and definite ascertainable standards established for admission to that program;" the refusal of placement to eligible children in programs while similarly situated children are admitted to such programs; and the denial of education to a child solely because he is emotionally disturbed. Permanent injunction is also sought to prevent the defendants from violating plaintiffs' rights. Finally, an order is requested to require the defendants to prepare a plan detailing how the plaintiffs' rights will be fully protected and to appoint a master to monitor development and implementation of the plan.

The case is pending in the United States District Court for the District of Massachusetts.

MINDY LINDA PANITCH, et. al., v. STATE OF WISCONSIN, CIVIL Action No. 72-L-461 (U.S. District Court, Wisconsin)

This suit is being brought against the state by Mindy Linda Panitch as representative of a class of children "who are multi-handicapped, educable children between the ages of four and twenty years, whom the state of Wisconsin through local school districts and the department of public instruction is presently excluding from, and denying to, a program of education and/or training in the public schools or in equivalent educational facilities."

The issue in this action is a Wisconsin statute and policy enabling handicapped children to attend "a special school, class or center" outside the state. When this occurs and depending upon the population of the child's residence, either the county or school district is required to pay the tuition and transportation. The policy limits the enrollment of children under this act to "public institutions." The rationale is that "constitutional and statutory limitations preclude in-state handicapped pupils attending private educational facilities and receiving the benefits of tuition. This policy maintains a consistency of treatment for out-of-state school attendees as well. Experience with the program to date has indicated that the potential costs accruing to counties in utilizing both public and private facilities would be a prohibitive factor. Similarly, the department lacks sufficient staff, resources, and authority to assess the adequacy of private school facilities."

The complaint alleges that the plaintiff and members of the class are denied equal protection of the laws since the "defendant does not, either through local school districts or the department of public instruction, provide any facility within the state to provide an education and/or training to plaintiff and other members of the class." This violation of the laws, it is alleged, occurs even though special education programs are available outside the state.

The relief sought includes:

1. the declaration that the statute and policy referred to above are unconstitutional and invalid;

2. direction from the court to the defendant to provide to the plaintiff and other members of the class "... a free elementary and high school education; and

3. all plaintiff costs.

To date, that state has not answered the complaint.

LORI CASE, et. al. v. STATE OF CALIFORNIA, DEPARTMENT OF EDUCATION, et. al., Civil Action No. 101679 (California Superior Court, Riverside County).

Lori Case is a school age child who has been definitively diagnosed as autistic and deaf and who may also be mentally retarded. After unsuccessfully attending a number of schools, both public and private for children with a variety of handicaps, Lori was enrolled in the multi-handicapped unit at the California School for the Deaf at Riverside, California. Plaintiff attorneys maintain that this unit was created specifically to educate deaf children with one or more additional handicaps requiring special education. Lori began attending the school in May 1970, and is alleged to have made progress - a point which is disputed by the defendants. The plaintiffs argue that to exclude her from Riverside would cause regression and possibly nullify forever any future growth. As a result of a case conference called to discuss Lori's status and progress in school, it was decided to terminate her placement on the grounds that she was severely mentally retarded, incapable of making educational progress, required custodial and medical treatment, and intensive instruction that could not be provided by the school because of staffing and program limitations.

The plaintiffs sought an immediate temporary restraining order and a preliminary and permanent injunction restraining defendants from preventing, prohibiting, or in any manner interfering with Lori's education at Riverside. A temporary restraining order and a preliminary injunction were granted by the Superior Court of the State of California for the County of Riverside.

The arguments presented by the plaintiffs are those seen in other "right to education" cases. The question of the definition of education or educability is raised. The plaintiff attorneys state that "if by 'uneducable' defendants mean totally incapable of benefiting from any teaching or training program, then plaintiffs are in agreement, but defendants' own declaration demonstrate that Lori is not uneducable in this sense. However, if by 'educable' defendants mean 'capable of mastering the normal academic program offered by the public schools,' then defendants are threatening to dismiss Lori on the basis of a patently unconstitutional standard. Application of such a narrow and exclusionary definition, in view of the extensive legislative provisions for programs for the mentally retarded, the physically handicapped, and the multi-handicapped would clearly violate both Lori's rights to due process and equal protection. The right to an education to which Lori is constitutionally entitled is the right to develop those potentials which she has."

Assuming acceptance of Lori's educability, the attorneys argue that "there is absolutely no distinction in law, or in logic, between a handicapped child and a physically normal child. Each is fully entitled to the equal protection and benefits of the laws of this State. Thus, to deprive Lori of her right to an education ... would violate her fundamental rights."

The issue raised by the defendants regarding staffing and program limitations was answered by pointing out that the courts have ruled that the denial of educational opportunity solely on the basis of economic reasons is not justifiable. And finally the manner in which the disposition of Lori's enrollment

The arguments presented by the attorneys for the petitioners justify on a variety of legal bases their rights to publicly-supported educational opportunities. In addition to citing the equal protection provisions of both the United States and California Constitutions, it is also pointed out that "denial of a basic education is to deny one access to the political processes. Full participation in the rights and duties of citizenship assumes and requires effective access to the political system..." Further, the attorneys argue that "one may be denied his economic rights through denial of an education." In addition, the petitioners are not only denied the same educational benefits as non-handicapped children, but also are denied that which is provided to other school-age children suffering from mental or physical disabilities. Finally, the attorneys provide an argument that refutes the frequently used high cost rationale for the denial of special education programs. They say that "granting an education to some while denying it to others is blatant grounds that providing one with rights to which he is entitled but unlawfully denied will result in additional expense. If the respondent in this case is unable to receive funding for the required classes from the state, it is incumbent on it to reallocate its own budget so as to equalize the benefits received by all children entitled to an education:"

This case is presently expected to go before the Superior Court of the State of California in and for the County of Contra Costa in November or December, 1972.

TIDEWATER ASSOCIATION FOR AUTISTIC CHILDREN v. COMMONWEALTH OF VIRGINIA, et. al. Civil Action No. 426-72-N, (U.S. District Court, E. D. Virginia)

In August, 1972, suit was entered in the Norfolk Division of the U.S. District Court for the Eastern District of Virginia on behalf of the class of autistic children who as plaintiffs against the state of Virginia and the state board of education for their alleged legal right to be provided with a free public program of education and training appropriate to each child's capacity.

The complaint is based upon the "basic premise" that "... the class of children which the plaintiff seeks to represent are entitled to an education and that they have a right under the United States Constitution to develop such skills and potentials which they, as a handicapped child, might have or possess. The plaintiff asserts that to deny an autistic child a right to an education is a basic denial of their fundamental rights."

It is also charged in the complaint that discrimination is being practiced against autistic children "since they are educable and no suitable program of training or education is available for them." It is also pointed out that the state has wrongfully failed to provide a program for these children on the basis that "there is not enough money available." The complaint also contains a history of the state's failure to establish pilot programs for approximately 22 children in the Tidewater Virginia area. After the request for funds from the state was reduced from $100,000 to $70,000, the state appropriated $20,000 to serve seven children in the four to seven year age range. Finally, it is alleged that if the requested relief is not granted, there are teen-age members of class" ... who will not have an opportunity to receive any training or education whatsoever."

Specifically, the relief sought includes:

1. Granting of declaratory judgment that the practices alleged in the complaint violate the Fourteenth Amendment of the U.S. Constitution.

2. Immediate establishment of free and appropriate programs of education and training geared to each child's capacity.

3. "Determine that each and every child, regardless of his or her mental handicap, is entitled to the equal protection of the law and a right to an education in accordance with the child's capacity."

4. Awarding of court and attorney fees to the plaintiffs.

On the 7th of September, the Commonwealth of Virginia submitted to the Court a motion to dismiss the suit for the following reasons:

1. "Plaintiff fails to state a claim upon which relief may be granted."

2. Suits may not be filed against the Commonwealth of Virginia.

3. The complaint should first be heard by a state rather than a federal court.

CRAIG UYEDA v. CALIFORNIA STATE SCHOOL FOR THE DEAF AT RIVERSIDE, et. al. (California)

In June, 1972, suit was initiated by the mother of Craig Uyeda, a profoundly deaf 10-year old boy against the California School for the Deaf at Riverside and its superintendent, Dr. Richard Brill for an alleged violation of the child's civil rights.

Craig, a child described as being "exceptionally bright" had been placed in the Riverside program since January, 1968. In May of 1972 the parents were instructed to take Craig home because of "emotional and frustration problems." The parents contend that if these problems are present it is even more necessary that Craig be retained in Riverside since there is a program there specifically designed for children with multiple learning problems.

This action, similar to Lori Case, et. al. v. State of California Department of Education, et. al., is presently pending waiting the selection of a trial date.

SETH KIVELL, P.P.A. vs. DR. BERNARD NEMOITIN, et. al., No. 143913, (Superior Court, Fairfield County at Bridgeport, Connecticut).

In a Memorandum of Decision issued by Superior Court Judge Robert J. Testo, on July 18, 1972, the mother of 12-year old Seth Kivell, "a perceptually handicapped child with learning disabilities" was awarded $13,400 to

pay for the out-of-state private education the child received for two years when it was held that the defendant Stamford, Connecticut, Board of Education did not offer an appropriate special education program for him.

The suit was brought by the mother of Seth Kivell when the child was initially classified by a Stamford Public School diagnostic team as a child in need of special education. The same team recommended a program to the parents who, on the basis of an independent evaluation and recommendation by a consulting psychologist transferred Seth to an out-of-state private school. The parents pursued their alleged rights through a local board hearing at which their appeal was denied and a state board hearing. After a state investigation, the state commissioner of education agreed with the plaintiff that the program offered for that year would not have met the child's needs. The commissioner indicated that if the Stamford board reversed its decision and assumed the tuition costs, the state under existing statutes would reimburse the district. This course was rejected by the Stamford board. The commissioner then ordered the district to submit a plan for his approval for the provision of appropriate special education services. Such a plan was approved and the parents were notified approximately two months after the start of the second school year for which the judgment applied.

Judge Testo wrote after reviewing the state's statutory obligation to handicapped children that "it is abundantly clear from the statutes that the regulation and supervision of special education is within the mandatory duty of the state board of education and that the local town board is its agent charged with the responsibility of carrying out the intent of the law which the minor needs and is entitled to."

An order was also issued "directing the Stamford Board of Education and Superintendent of Schools of said City to furnish the minor with the special education required by the statutes of this State. Compliance of this order shall mean the acceptance and approval by the State Board of Education of the program submitted by the local board of education."

It is worthy of note that the judge anticipated that on the basis of his decision a multitude of similar suits might be filed. Consequently he stated that "this court will frown upon any unilateral action by parents in sending their children to other facilities. If a program is timely filed by a local board of education and is accepted and approved by the state board of education, then it is the duty of the parents to accept said program. A refusal by the parents in such a situation will not entitle said child to any benefits from this court."

IN RE HELD, Docket Nos. H-2-71 and H-10-71, N.Y. FAMILY COURT, WESTCHESTER COUNTY, NEW YORK

This case heard in Westchester County, New York Family Court concerned the failure of the Mt. Vernon Public Schools to adequately educate eleven year old Peter Held. These proceedings were initiated after Peter Held had been enrolled in the public schools for five years, three of which in special education classes. During that time the child's reading level never exceeded that of an

average first grade student. After the child was removed from the public school and placed in a private school, his reading level in one year increased about two grades and he "...became a class leader."

In his decision, Judge Dachenhausen "... noted with some concern, the lack of candor shown by the representative of the Mount Vernon city school district in not acknowledging the obvious weaknesses and failure of its own special education program to achieve any tangible results for this child over a five year period." In commenting about the progress made by the child in the private school, the judge said, "It seems that now, for the first time in his young life, he has a future." Further, the judge noted that "This court has the statutory duty to afford him an opportunity to achieve an education."

The court in its ruling issued November 29, 1971, noted that since the child "to develop his intellectual potential and succeed in the academic area" must be placed in a special education setting such as the private school and since, "It is usually preferable for a child to continue at the school where she is making satisfactory progress" (Knauff v. Board of Education, 1968, 57 Misc 2d 459) ordered that the cost of Peter Held's private education be paid under the appropriate state statute provisions for such use of public monies. The costs of transporting the child to the private school was assumed by the local district.

It is important to note that a year earlier, the child's mother applied for funds under the same statute for the payment of this private tuition but the application was not approved. This occurred even though "The superintendent of the Mount Vernon public schools" certified that the special facilities provided at the private school were not available in the child's home school district. Also of interest is that in June of 1971, an initial decision on this matter to require the state and the city of Mount Vernon, where the child resides to each pay one half of the private school tuition. That decision was vacated and set aside because the city argues that the court lacked jurisdiction over the city because "no process was ever served upon it and it never appeared in any proceeding."

RIGHT TO TREATMENT

WYATT v. STICKNEY M.D. et. al., 334F Supp. 1341 (M. D. Alabama, 1971), 32FF. Supp. 781 (M. D. Alabama, 1971)

This action, originally focused on the claim of state hospitalized mentally ill patients to receive adequate treatment, began in September, 1970, in Alabama Federal District Court. In March, 1971, Judge Johnson ruled that mentally ill patients involuntarily committed to Bryce Hospital were being denied the right "to receive such individual treatment as (would) give each of them a realistic opportunity to be cured or to improve his or her mental condition." The court gave the defendants six months to upgrade treatment, to satisfy constitutional standards, and to file a progress report. Prior to the filing of that report, the court agreed to expand the class to include another state hospital for the emotionally ill and the mentally retarded at the Partlow State School and Hospital.

The defendants' six month progress report was rejected by the court and a hearing was scheduled to set objective and measurable standards. At the hearing in February, 1972 evidence was produced which led the court to find "the evidence ... has vividly and undisputably portrayed Partlow State School and Hospital as a warehousing institution which because of its atmosphere of psychological and physical deprivation, is wholly incapable of furnishing habilitation to the mentally retarded and is conducive only to the deterioration and the debilitation of the residents." The court further issued an emergency order "to protect the lives and well-being of the residents of Partlow." In that order the court required the state to hire within 30 days 300 new aide-level persons regardless of "former procedures," such as civil service. The quota was achieved.

On April 13, 1972, a final order and opinion setting standards and establishing a plan for implementation was released. In the comprehensive standards for the total operation of the institution are provisions for individualized evaluations and plans and programs relating to the habilitation ("the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency.") Habilitation includes, but is not limited to, programs of formal structured education and treatment of every resident. Education is defined within the order as "the process of formal training and instruction to facilitate the intellectual and emotional development of residents." The standards applying to education within the order specify class size, length of school year, and length of school day by degree of retardation.

Finally, the court requires the establishment of a "human rights committee" to review research proposals and rehabilitation programs, and to advise and assist patients who allege that the standards are not being implemented or that their civil rights are being violated. Further, the state must present a six-month progress report to the court and hire a qualified and experienced administrator for the institution.

As of this date, the state has filed notice to appeal some or all of the court's decisions.

BURNHAM v. DEPARTMENT OF PUBLIC HEALTH OF THE STATE OF GEORGIA, (Civil Action No. 16385 (N. D. Georgia).

This is a suit seeking class action status on behalf of all patients voluntarily or involuntarily committed to any of the six state-owned and operated facilities named in the complaint and operated for the diagnosis, care and treatment of mentally retarded or mentally ill persons under the auspices of the Department of Public Health of the State of Georgia. Each of the named plaintiffs is or has been a patient, at one of these institutions. The case was filed on March 29, 1972, in the United States District Court for the Northern District of Georgia.

Defendants in this case are the Department of Public Health, the Board of Health of the State of Georgia, and Department and Board members and officials; the superintendents of the six named institutions; and the judges of courts of ordinary of the counties of Georgia, which are the courts specifically authorized by Georgia law to commit a person for involuntary hospitalization.

The complaint alleges violations of the 5th, 8th, and 14th Amendments to the U.S. Constitution. It seeks a preliminary and permanent injunction and a declaratory judgment. Specifically, the declaratory relief sought includes a court finding that the patients in the defendant institutions have a constitutional right to adequate and effective treatment; a court finding that each of the institutions named in the complaint is currently unable to provide such treatment; and a holding by the Court that constitutionally adequate treatment must be provided to the patients in the institutions named in the complaint.

The plaintiffs requested the following:

1. That defendants be enjoined from operating any of the named institutions in a manner that does not conform to constitutionally required standards for diagnosis, care and treatment;

2. That defendants be required to prepare a plan for implementing the right to treatment;

3. That further commitments to the defendant institutions be enjoined until these institutions have been brought up to constitutionally required standards; and

4. That the Court award reasonable attorney's fees and costs to counsel.

Defendants filed in answer to plaintiffs complaint on April 21, 1972, in which they raise several legal defenses, such as lack of jurisdiction, and moved to dismiss on several grounds.

On May 11, plaintiffs received Defendant's brief on their motion to dismiss. Plaintiffs' lawyer plans to file a reply brief prior to formal discovery. He does not plan to seek preliminary relief until after the discovery process.

On August 3, 1972, Judge Sidney D. Smith, Jr. granted the defendants' motion for summary judgment and dismissed this case. The ruling of the court centered on the following major points:

1. The court could find no legal precedent to allow for the declaration that there exists a "federal constitutional right to treatment (to encompass 'care' and 'diagnosis') for the mentally ill." Based on this finding, the judge ruled that the action could not be maintained.

2. Judge Smith, in his decision, disagreed with the Wyatt Alabama decision, primarily on the basis of the absence of a federal statute requiring the right to treatment. He added that "the factual context in those Alabama decisions (budgetary lots by the state legislature causing further deterioration of an existing deficient institutional environment) is also substantially different from the existent situation in the Georgia mental health institutions."

3. The court also held that "... a conclusion as to the lack of jurisdiction over the person of named defendants is also compelled by the eleventh amendment to the U.S. Constitution." This conclusion was based upon the failure to demonstrate the "... denial of a constitutionally protected right nor a federally guaranteed statutory right."

4. Judge Smith also commented about the appropriateness of the courts in defining "adequate" or "constitutionally adequate" treatment.

Specifically he wrote that these questions "... defy judicial identity and therefore prohibits its breach from being judicially defined." Further, he acknowledged the defendants' argument that "the question of what in detail constitutes "adequate treatment" is simply not capable of being spelled out as a mathematical formula which could be applied to and would be beneficial for all patients. Everyone knows that what might be good treatment for one patient could be bad or even fatal for another."

RICCI, et. al. v. GREENBLATT, et. al., Civil Action No. 72-469F (Massachusetts)

This is another class action suit regarding the right to treatment in institutions. The plaintiffs were children in the Belchertown State School in Massachusetts and the Massachusetts Association for Retarded Children, who like in the Wyatt, Parisi, and New York Association for Retarded Children actions, alleged violations of their constitutional rights. The defendants were various state officials and officials of the school. Motions for a temporary restraining order and preliminary injunction were granted by the court in February, 1972, which serves to maintain the status quo until litigation is completed.

Among the provisions of those orders was that "the defendants develop comprehensive treatment plans for the residents which include adequate and proper educational services." On April 20, 1972, the defendants had filed answers to all allegations of the plaintiffs' complaint.

This case has been reassigned to another district court judge. A contempt motion was also filed against the defendants for their failure to carry out issued orders.

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN et. al. v. ROCKEFELLER, et. al. 72 Civil Action No. 356. PATRICIA PARISI, ANSELMO CLARKE, et. al. v. ROCKEFELLER, et. al. (E. D. New York)

These two actions were filed in the U.S. District Court for the Eastern District of New York. Both allege that the conditions at the Willowbrook State School for the Mentally Retarded violated the constitutional rights of the residents. These class action suits are modeled after the Wyatt v. Stickney (Partlow State School and Hospital, Alabama) case.

Extensive documentation was presented by the plaintiffs alleging the denial of adequate treatment. The evidence touched all elements of institutional life including: overcrowding, questionable medical research, lack of qualified personnel, insufficient personnel, improper placement, brutality, peonage, etc. It is alleged in the Parisi, et. al. v. Rockefeller complaint that "No goals are set for the education and habilitation of each resident according to special needs and specified period of time." It was specifically charged that 82.7 percent of the residents are not receiving school classes, 98.3 percent are not receiving pre-vocational training, and 97.1 percent are not receiving vocational training.

The plaintiffs in Parisi, et. al. are seeking: declaration of their constitutional rights, establishment of constitutionally minimum standards for applying to all aspects of life; due process requirements to determine a "developmental program" for each resident; development of plans to construct community-based residential facilities and to reduce Willowbrook's resident population; cessation of any construction of non-community based facilities, until the court determined that sufficient community based facilities exist; and appointment of a master to oversee and implement the orders of the court.

Both complaints include specific mention of the necessity for including within "developmental plans" and subsequent programs, appropriate education and training.

The preliminary schedule on these cases, which were to be consolidated, was for plaintiffs and defendants to meet in early May to stipulate standards.

PATRICIAL WELSCH, et. al. v. VERA J. LIKINS, COMMISSIONER OF PUBLIC WELFARE, et. al., No. 4-72 Civil Action 451 (U.S. District Court, District of Minnesota, 4th Division).

In this action six plaintiffs are named as representative of a 3,500 member class--persons presently in Minnesota's state hospitals for the mentally retarded. Named defendants are the present and former acting commissioners of public welfare and the chief administrator of each of the state's six hospitals.

The plaintiffs include severely and moderately retarded persons who are allegedly denied their right to due process of law since they do not receive "... a constitutionally minimal level of 'habilitation,' a term which incorporates care, treatment, education, and training." It is specifically charged that the plaintiffs and others similarly situated are not provided with a humane psychological and physical environment. The complaint presents supporting evidence that some residents live in "old, poorly designed and hazardous" buildings not meeting state board of health safety and health standards, 'overcrowded dormintories,' bleak accommodations; and improperly equipped bathroom and toilet facilities. Additionally, it is indicated that residents are "subject to threats and physical assaults by other residents," improperly clothed, and denied any personal privacy.

It is further alleged that there is both an insufficient quantity of staff and insufficiently trained staff necessary to provide appropriate programs of habilitation. Due to staff shortages many residents have been forced to work in the institution as employees yet, according to the complaint, are denied payment as required by the fair labor standards act. Another allegation is that the "defendants have failed and refused to plan for and create less restrictive community facilities ..." even though many members of the class could function more effectively in such programs.

It is further argued that "the final condition for constitutionally adequate habilitation is the preparation for each resident of an individualized, comprehensive habilitation plan as well as a periodic review and re-evaluation of such a plan. On information and belief, defendants have failed to provide plaintiffs and the class they represent with a comprehensive habilitation plan or to provide periodic review of these plans."

The plaintiffs are seeking a judgment to include the following:

1. A declaratory judgment that Minnesota's state institutions "... do not now meet constitutionally minimal standards of adequate habilitation including care, treatment and training."

2. A declaratory judgment specifying constitutionally minimum standards of adequate habilitation for mentally retarded persons confined in the state institutions under the supervision and management of the commissioner of public welfare.

3. Injunctions preventing defendants "from failing or refusing to rectify the unconstitutional conditions, policies and practices" described in the complaint and requiring them to "promptly meet such constitutionally minimal standards as this Court may specify."

4. Injunctions requiring the defendants "to pay plaintiffs and the class they represent working in the named institutions the minimum wage established pursuant to the Fair Labor Standards Act as amended, 29 U.S.C. Sec. 201 et seq."

5. Appointment of a master.

6. Awarding of costs to the plaintiffs.

PLACEMENT

LARRY P., M.S., M.J., et. al. v. RILES, et. al. Civil Action No. C-71-2270 (N. D. California).

This class action suit was filed in late November, 1971, on behalf of the six named black, elementary aged children attending classes in the San Francisco Unified School District. It is alleged that they have been inappropriately classified as educable mentally retarded and placed and retained in classes for such children. The complaint argued that the children were not mentally retarded, but rather "the victims of a testing procedure which fails to recognize their unfamiliarity with the while middle class cultural background and which ignores the learning experiences which they may have had in their homes." The defendants included state and local school officials and board members.

It is alleged that misplacement in classes for the mentally retarded carries a stigma and "a life sentence of illiteracy." Statistical information indicated that in the San Francisco Unified School District, as well as the state, a disproportionate number of black children are enrolled in programs for the retarded. It is further pointed out that even though code and regulatory procedures regarding identification, classification, and placement of the mentally retarded were changed to be more effective, inadequacies in the processes still exist.

The plaintiffs asked the court to order the defendants to do the following:

1. Evaluate or assess plaintiffs and other black children by using group or individual ability or intelligence tests which properly account for the cultural background and experience of the children to whom such tests are administered.

2. Restrict the placement of the plaintiffs and other black children now in classes for the mentally retarded on the basis of results of culturally discriminatory tests and testing procedures;

3. Prevent the retention of plaintiffs and other black children now in classes for the mentally retarded unless the children are immediately reevaluated and then annually retested by means which take into acount cultural background;

4. Place plaintiffs into regular classrooms with children of comparable age and provide them with intensive and supplemental individual training thereby enabling plaintiffs and those similarly situated to achieve at the level of their peers as rapidly as possible;

5. Remove from the school records of these children any and all indications that they were/are mentally retarded or in a class for the mentally retarded and ensure that individual children not be identified by the results of individual or group I.Q. tests;

6. Take any action necessary to bring the distribution of black children in classes for the mentally retarded into close proximity with the distribution of blacks in the total population of the school districts;

7. Recruit and employ a sufficient number of black and other minority psychologists and psychometrists in local school districts, on the admissions and planning committees of such districts, and as consultants to such districts so the tests will be interpreted by persons adequately prepared to consider the cultural background of the child. Further, the State Department of Education should be required in selecting and authorizing tests to be administered to school children throughout the state, to consider the extent to which the testing development companies utilized personnel with minority ethnic backgrounds and experiences in the development of culturally relevant tests;

8. "Declare pursuant to the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act and Regulations, that the current assignment of plaintiffs and other black students to California mentally retarded classes resulting in excessive segregation of such children into these classes is unlawful and unconstitutional and may not be justified by administration of the currently available I.Q. tests which fail to properly account for the cultural background and experience of black children."

This case is pending in the United States District Court for the Northern District of California.

LEBANKS, et. al. v. SPEARS, et. al. Civil Action No. 71-2897 (E. D. Louisiana, New Orleans Division).

Eight black children classified as mentally retarded, have brought suit against the Orleans Parish (New Orleans) School Board and the superintendent of schools on the basis of the following alleged practices:

1. Classification of certain children as mentally retarded is done arbitrarily and without standards or "valid reasons." It is further alleged that the tests and procedures used in the classification process discriminate against black children.

2. The failure to re-evaluate children classified as retarded to determine if a change in their educational status is needed.

3. Failure to provide any "education or instruction" to some of the children on a lengthy waiting list for special education programs, and also denial of educational opportunities to other retarded children excluded from school and not maintained on any list for readmittance.

4. Maintenance of a policy and practice of not placing children beyond the age of 13 in special education programs.

5. Failure "... to advise retarded children of a right to a fair and impartial hearing or to accord them such a hearing with respect to the decision classifying them as 'mentally retarded,' the decision excluding them from attending regular classes, and the decision excluding them from attending schools geared to their special needs."

6. The unequal opportunity for an education provided to all children who are classified as mentally retarded; unequal opportunity between children classified as mentally retarded and normal; and unequal opportunity between black and white mentally retarded children.

The attorneys for the plaintiffs in summary indicate that many of the alleged practices of the parish* violate the equal protection and due process provisions of the fourteenth amendment. They further state that "continued deprivation (of education) will render each plaintiff and member of the class functionally useless in our society; each day leaves them further behind their more fortunate peers."

The relief sought by the plaintiffs includes the following:

1. A $20,000.00 damage award for each plaintiff;

2. Preliminary and permanent injunction to prevent classification of the plaintiffs and their class as mentally retarded through use of procedures and standards that are arbitrary, capricious, and biased; the exclusion of the plaintiffs and their class from the opportunity to receive education designed to meet their needs; discrimination "in the allocation of opportunities for special education, between plaintiffs, and other black retarded children, and white retarded children," the classification of plaintiffs and their class as retarded and their exclusion from school or special education classes without a provision of a full, fair, and adequate hearing which meets the requirements of due process of law."

This case is expected to be heard early in the summer, 1972.

*Parish is the Louisiana term for county.

GUADALUPE ORGANIZATION, INC. v. TEMPE ELEMENTARY SCHOOL DISTRICT, Civil Action No. 71-435 (Phoenix District, Arizona, January 24, 1972)

This Arizona case was brought by the Guadalupe Organization, Inc. regarding the disproportionate number of bilingual children enrolled in classes for the mentally handicapped. The action which has now been stipulated provides for the following:

1. Re-evaluation of children assigned to the Tempe special education program for the mentally retarded to determine if any bilingual children had been incorrectly assigned to such placements.

2. Prior to the assignment of a bilingual child to the program for the mentally retarded, the child must be retested in his primary language and have his personal history and environment examined by an appropriate "professional advisor," such as a psychologist or social worker.

3. The records of children found to be incorrectly assigned to the programs must be corrected.

4. All communications from the school to the family of a bilingual child must be in the family's primary language and must include information about the success of the special education program and notice of their right to withdraw their children from it.